



38 CFR Part 21

RIN 2900-AQ99

Bar to Approval

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its regulations that govern VA's administration of educational assistance programs to implement a provision of the Veterans Benefits and Transition Act of 2018, which requires a State Approving Agency (SAA), or the Secretary of VA (when acting as the SAA), to disapprove programs of education provided by educational institutions that do not permit individuals using benefits under certain VA educational assistance programs to attend or participate in courses while awaiting payment from VA and that impose a penalty on an individual for failure to meet financial obligations due to a delayed VA payment. We would also implement a provision that would allow educational institutions to require a claimant using education benefits to submit certain documents. In addition, we would make clear that an educational institution may require a claimant to pay certain fees or charges if VA delays payment and ultimately pays less than what an educational institution anticipated receiving.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments must be submitted through www.regulations.gov. Except as provided below, comments received before the close of the comment period will be available at www.regulations.gov for public viewing, inspection, or copying, including any personally identifiable or confidential business information that is included in a comment. We post the comments received before the close of the comment period on

the following website as soon as possible after they have been received: <https://www.regulations.gov>. VA will not post on Regulations.gov public comments that make threats to individuals or institutions or suggest that the commenter will take actions to harm the individual. VA encourages individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments. Any public comment received after the comment period's closing date is considered late and will not be considered in the final rulemaking.

FOR FURTHER INFORMATION CONTACT: Cheryl A. Amitay, Chief, Policy and Regulation Development Staff (225C), Education Service, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9800 (This is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION: Prior to August 1, 2019, an educational institution could prohibit an individual utilizing educational assistance under chapter 31 or chapter 33 of title 38, U.S.C., from attending classes if either part or all the claimant's tuition and fees had not been paid, even if the delinquent tuition and fee payment was due to a delay in VA paying the school. On December 31, 2018, sec. 103 of the Veterans Benefits and Transition Act of 2018, Pub. L. 115-407, added subsection (e) to 38 U.S.C. 3697. Section 3679(e) requires a State Approving Agency (SAA), or the Secretary of the Department of Veterans Affairs (VA) when acting as a SAA, to disapprove, programs of education that do not permit individuals using benefits under either chapter 31 or chapter 33 to attend or participate in courses while awaiting payment from VA. Specifically, beginning on August 1, 2019, an educational institution is prohibited from employing a policy which prevents an individual from attending classes or participating in a program of education while awaiting payment from VA if the individual provides the school with a "certificate of eligibility." In addition, an educational

institution must not impose any penalty on an individual for failure to meet financial obligations due to a delayed VA payment under chapter 31 or chapter 33. However, the law authorizes VA to waive any of these requirements as considered appropriate.

VA proposes to add 38 CFR 21.4259A to implement these statutory provisions. We would make clear in § 21.4259A(a)(1) that an educational institution will face disapproval if it does not permit a claimant using benefits under chapter 31 or chapter 33 to attend courses within their program of education beginning on the date the claimant provides the necessary eligibility documentation until the earlier of the date VA provides payment to the educational institution or 90 days after the date the educational institution certifies its tuition and fees charges to VA following receipt of the claimant's eligibility documentation.

Section 103 does not explicitly define "certificate of eligibility" and does not otherwise refer to any one VA document or form that provides eligibility documentation. We interpret the term "certificate of eligibility" as used in sec. 103 as referring to any verifiable and authoritative document describing a claimant's entitlement to education benefits, to include the amount or percentage of benefits and the last date to use the benefits awarded, such as a decision or notice of a decision on a claimant's application for educational assistance, a letter from VA, an updated award letter from VA, a print-out of eligibility (statement of benefits) from e-Benefits, or a Statement of Benefits from the Post-9/11 GI Bill Benefits tool.

In addition, § 21.4259A(a)(2) would make clear that an educational institution must ensure that it does not impose any penalty, including the assessment of late fees, denial of access to classes, libraries, or other institutional facilities, or require a claimant using benefits under chapter 31 or chapter 33 to borrow additional funds due to the inability to meet his or her financial obligations to the institution, as a result of delayed payments of educational assistance from VA.

In § 21.4259A(b), we would define a covered individual for purposes of this section as any individual who is entitled to educational assistance under 38 U.S.C. chapter 31 or chapter 33. Section 21.4259A(c) would contain the authorized provision allowing VA to waive any of the requirements regarding the educational institutions' responsibilities in § 21.4259A.

Under new sec. 3679(e)(4), educational institutions would nonetheless be permitted to require a claimant using benefits under chapter 31 or chapter 33 to take the following actions:

- Submit verifiable and authoritative proof of eligibility for entitlement to educational assistance not later than the first day of a course of education for which the claimant has indicated he or she wishes to use entitlement to educational assistance.
- Submit a written request to use such entitlement.
- Provide additional information necessary to the proper certification of enrollment by the educational institution.

We would include these submissions that an educational institution may require in § 21.4259A(d)(1). In addition, in § 21.4259A(d)(1)(iii), to give notice to students attending an educational institution and to facilitate VA's oversight of educational institutions' compliance with the law, we would require an educational institution to clearly state any requirements for the submission of additional information for certifying enrollment in their published catalog and would also require approval by the SAA of any requirements to submit additional information.

Section 103(c) further provides that an educational institution may collect additional payments or fees from a claimant in an amount that is the difference between the amount owed and the amount VA paid if the claimant is unable to meet his or her financial obligations to the institution because of delayed payments of educational

assistance from VA under chapter 31 or chapter 33 and the amount that VA eventually pays is less than what the educational institution anticipated receiving. Thus, when a claimant is not entitled to payment of the full amount of tuition, but the educational institution anticipated receiving full tuition, the educational institution may collect the difference between the amount VA has paid to the educational institution on the claimant's behalf and the total amount owed by the claimant to the educational institution. We would implement this requirement in § 21.4259A(d)(2).

We interpret the permissibility of allowing a school to collect the additional payment in cases when VA does not ultimately pay the amount the educational institution anticipates receiving as indicating Congress' intent to allow a school to require a claimant to pay fees or charges that VA does not ordinarily pay in any event. VA ordinarily pays subsistence, tuition, fees, and other educational costs. See 38 U.S.C. 3313(a); *see also* 38 CFR 21.9620 (noting tuition and fees are payable). VA does not ordinarily pay for room and board and certain optional fees. According to 38 CFR 21.9505, "fees" means "any mandatory charges (other than tuition, room, and board) that are applied by the institution of higher learning for pursuit of an approved program of education." Also, according to § 21.9505, "fees do not include those charged for a study abroad course(s) unless the course(s) is a mandatory requirement for completion of the approved program of education." On the other hand, pursuant to § 21.9505, payable fees include, but are not limited to, health premiums, freshman fees, graduation fees, and lab fees. Therefore, for example, if a claimant is living in a dormitory, section 3679(e) does not prohibit the school from following its standard procedures for charging and collecting payment (including assessing late fees or penalties) for dormitory fees. Another example is that the school is not prohibited from charging and collecting optional fees such as for parking permits. However, the school is prohibited from charging the claimant for mandatory freshman fees, health premiums,

graduation fees, or lab fees, or assessing late fees due to VA's delayed payment of these mandatory fees. We would make clear in § 21.4259A(d)(2)(i) that a school would not be prohibited from requiring a claimant to pay fees or charges that VA does not ordinarily pay, and in § 21.4259A(d)(2)(ii), that a school may use standard debt collection policies for collecting these fees.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this proposed rule is not a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at www.regulations.gov.

Regulatory Flexibility Act

The Secretary of Veterans Affairs hereby certifies that this proposed regulatory action would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. Although this proposed rule includes provisions that entail costs to training institutions, such as the loss of late fees that institutions are prohibited from assessing when a student is unable to meet financial obligations to the institution, and the cost of publication of the requirements for submitting additional information needed for certifying enrollment, the provisions merely restate existing provisions of statute, and thus will have no additional impact on such small entities. Therefore, under 5 U.S.C. 605(b), this proposed rule is

exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This proposed rule includes a provision constituting a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that requires approval by the Office of Management and Budget (OMB). Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review.

OMB assigns control numbers to collections of information it approves. VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed 38 CFR 21.4259A contains a collection of information under the Paperwork Reduction Act of 1995. If OMB does not approve the collection of information as requested, VA will immediately remove the provision containing a collection of information or take such other action as is directed by OMB.

Comments on the new collection of information contained in this rulemaking should be submitted through HYPERLINK "<https://www.regulations.gov/>". Comments should indicate that they are submitted in response to "RIN 2900-AQ99; Bar To Approval" and should be sent within 60 days of publication of this rulemaking. The

collection of information associated with this rulemaking can be viewed at: [HYPERLINK "https://www.reginfo.gov/public/do/PRAMain"](https://www.reginfo.gov/public/do/PRAMain).

OMB is required to make a decision concerning the collection of information contained in this proposed rule between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

The Department considers comments by the public on proposed collections of information in –

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility;
- Evaluating the accuracy of the Department's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The collection of information contained in 38 CFR 21.4259A is described immediately following this paragraph, under its respective title.

Title: Publishing of Requirement to Submit Additional Information Necessary for Certification of Enrollment

OMB Control No: 2900-xxxx

- Summary of collection of information: This new collection of information in proposed § 21.4259(d)(1)(iii) would require educational institutions to give notice to enrolled and potential students of any information in addition to the information already enumerated in their catalogs that the educational institution requires for certification of claimants' enrollment. The educational institutions would be required to publish any additional information, after it is approved by the SAA, in their online or print catalogs.
- Description of need for information and proposed use of information: The information collected will be used by VA to facilitate VA's oversight of educational institutions and to ensure their compliance with § 21.4259A.
- Description of likely respondents: Educational institutions
- Estimated total number of respondents: 16,084 educational institutions
- Estimated frequency of responses: Once
- Estimated average burden per response: Two hours or less
- Estimated total annual reporting and recordkeeping burden: VA estimates the total annual reporting and recordkeeping burden to be 32,168 burden hours. Using the annual number of responses, VA estimates a total annual reporting and recordkeeping burden of 32,168 hours for respondents.
- Estimated cost to respondents per year: VA estimates the annual cost to respondents to be \$901,025.68 (16,084 respondents per year x 2 hours per application x \$28.01*).

* To estimate the total information collection burden cost, VA used the Bureau of Labor Statistics (BLS) median hourly wage for "all occupations" of \$28.01 per

hour. This information is available at:

https://www.bls.gov/oes/current/oes_nat.htm#00-0000

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.027, Post-9/11 Veterans Educational Assistance; 64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces, Claims, Colleges and universities, Education, Employment, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on February 21, 2023, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Luvenia Potts,

Regulation Development Coordinator,

Office of Regulation Policy & Management,

Office of General Counsel,

Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 21 as set forth below:

PART 21—VOCATIONAL REHABILITATION AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

1. The authority citation for part 21, subpart D continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

2. Add § 21.4259A to read as follows:

§ 21.4259A Bar to approval.

(a) Beginning on August 1, 2019, a State approving agency, or the Secretary when acting in the role of the State approving agency, shall disapprove a program of education provided by an educational institution that has in effect a policy that is inconsistent with any of the following:

(1) A policy that permits any covered individual to attend or participate in the program of education during the period beginning on the date on which the individual provides to the educational institution any verifiable and authoritative VA document demonstrating entitlement to educational assistance under 38 U.S.C. chapter 31 or chapter 33 (such as a decision or notice of decision on entitlement, letter from VA, updated award letter from VA, print-out of eligibility (statement of benefits) from e-Benefits, or Statement of Benefits from the Post-9/11 GI Bill Benefits tool) and ending on the earlier of the following dates:

(i) The date on which payment from VA is made to the institution.

(ii) The date that is 90 days after the date on which the educational institution certifies tuition and fees following receipt of the verifiable and authoritative VA document proving entitlement to educational assistance under 38 U.S.C. chapter 31 or chapter 33.

(2) A policy that ensures an educational institution will not impose any penalty, including the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that a covered individual borrow additional

funds, on any covered individual because of the individual's inability to meet his or her financial obligations to the institution due to the delayed disbursement of a payment to be provided by VA under 38 U.S.C. chapter 31 or chapter 33.

(b) For purposes of this section, a covered individual is any individual who is entitled to educational assistance under 38 U.S.C. chapter 31 or chapter 33.

(c) The Secretary (or designee) may waive such requirements of paragraph (a) of this section as the Secretary (or designee) considers appropriate.

(d) It shall not be inconsistent with a policy described in paragraph (a) of this section for an educational institution:

(1) To require a covered individual to take the following additional actions:

(i) Submit any verifiable and authoritative VA document to prove entitlement to educational assistance under 38 U.S.C. chapter 31 or chapter 33 not later than the first day of a program of education for which the individual has indicated the individual wishes to use the individual's entitlement to educational assistance.

(ii) Submit a written request to use such entitlement.

(iii) Provide additional information necessary to the proper certification of enrollment by the educational institution. If an educational institution intends to require additional information necessary for proper certification of enrollment, any such requirement must be included in the school's published catalog and also must be approved by the State approving agency, or the Secretary when acting in the role of the State approving agency, as being necessary for proper certification and not overly burdensome to submit.

(2) In a case in which a covered individual is unable to meet a financial obligation to an educational institution due to the delayed disbursement of a payment to be provided by VA under 38 U.S.C. chapter 31 or chapter 33 and the amount of such disbursement is less than the educational institution anticipated, to require additional

payment of or impose a fee for the amount that is the difference between the amount of the financial obligation and the amount of the disbursement.

(i) Such additional payment may include the amount of a financial obligation associated with charges for which VA does not pay benefits (e.g., room and board, any portion of tuition for which a claimant does not qualify).

(ii) An educational institution may utilize its standard debt collection policies for these amounts, including the assessment of late fees.

(Authority: 38 U.S.C. 3697(e))

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